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June 24, 1999

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JUN 24 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
12th Street Lobby, Counter TW-A325  
Washington, D.C. 20554

**RE: Ex Parte Notice**  
**CC Docket No. 96-115, Subscriber List Information**

Dear Ms. Salas:

On June 22, 1999, Lois Pines, Philip Weiser, and the undersigned, on behalf of INFONXX, Inc. (INFONXX), a competitive directory assistance provider, spoke ON June 22, 1999 via telephone with William Kehoe and Greg Cook of the Common Carrier Bureau.

INFONXX reiterated its position that the Commission should interpret the provisions of Section 222(e) of the Communications Act to promote the underlying congressional goal of encouraging competition in the market for telephone directory services. Specifically, INFONXX urged the Commission:

- To clarify that competitive directory assistance (DA) providers disseminating telephone directory information orally in response to individual requests are persons "publishing directories in any format" and are therefore entitled under Section 222(e) to receive subscriber list information (SLI) from local exchange carriers (LECs) at reasonable and nondiscriminatory rates, terms and conditions; and
- To determine that the appropriate point of comparison for nondiscrimination with respect to rates, terms and conditions for SLI provided to competitive DA providers such as INFONXX is the rates, terms and conditions under which SLI is provided to competitive LECs and other DA providers, under interconnection agreements or otherwise.

INFONXX noted that additional support for these conclusions can be derived from Sections 201, 202, 205 and 251 of the Act. Section 201(b) requires all charges, practices, classifications and regulations "for and in connection with" communication services provided by a common carrier to be just and reasonable. Section 202 prohibits any common carrier from unjustly or unreasonably discriminating in charges, practices, classifications, regulations or services for or in connection with a communication service. Section 205 authorizes the FCC to establish just and reasonable charges, practices, classifications or regulations for any found to be

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in violation of these obligations. Section 251 requires LECs to provide SLI to persons trying to compete with incumbent providers. Thus, to the extent that a LEC offers SLI to competitive DA providers at discriminatory, unjust or unreasonable rates, terms or conditions, it could be found in violation of Sections 201 and 202 and subject to FCC rate- or term-setting under Section 205.

INFONXX also stressed that these issues are now ripe for decision in this proceeding. The Administrative Procedure Act (APA) requires that a rulemaking be preceded by notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>1</sup> As the Commission has recognized, this provision "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."<sup>2</sup> Rather, notice is sufficient as long as the final rules are a "logical outgrowth" of the rulemaking proposal.<sup>3</sup> "[T]he focus of this test is 'whether . . . [the party], ex ante, should have anticipated that such a requirement might be imposed.'"<sup>4</sup> This standard is satisfied here. The clarification INFONXX seeks is a "logical outgrowth" of the proposals outlined in the *Notice of Proposed Rulemaking* and the participants in this proceeding have had plenty of opportunity to comment on the issue of who should be considered "persons . . . publishing directories in any format" within the meaning of Section 222(e). The *Notice* states that the purpose of this proceeding is to "interpret and specify in more detail a telecommunication carrier's obligations under subsections 222(c)-(f) of the 1996 Act."<sup>5</sup> Among the specific issues raised with respect to the interpretation of Section 222(e), the *Notice* seeks comment on the safeguards necessary "to ensure that a person seeking subscriber list information is doing so for the specified purpose of 'publishing directories in any format.'"<sup>6</sup> Whether a person who makes available directories through live operators is "publishing directories in any format," and therefore entitled to SLI under Section 222(e), is directly related to this issue. Therefore, the issue raised by INFONXX is clearly within the scope of the *Notice*, and it is thus appropriate under the APA for the Commission to address and to resolve the issue at this stage in the proceeding.

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<sup>1</sup> 5 U.S.C. § 553(b)(3).

<sup>2</sup> Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, 12 FCC Rcd 13942, 13959 (1997).

<sup>3</sup> *Id.* (quoting *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980)); *see also Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

<sup>4</sup> Memorandum Opinion & Order, *Implementation of the AM Expanded Band Allotment Plan*, MM Docket No. 87-267, 13 FCC Rcd 21872, 21876 (1998) (citing *Small Refiner Lead Phase-Down Task Force v. FCC*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

<sup>5</sup> Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information*, CC Docket No. 96-115, ¶ 2 ("Notice").

<sup>6</sup> *Id.* ¶ 46.

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An original and one copy of this notice are being filed with the Commission for inclusion in the record of each docket discussed. Please direct any questions to the undersigned.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gerard J. Waldron".

Gerard J. Waldron  
Mary N. Williams  
*Counsel to INFONXX*

cc: William Kehoe  
Greg Cook